Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-308

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

DELPRO COMPANY,

*Petitioner*

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

*Respondents*

and

DELPRO COMPANY,

*Petitioner*

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

EDWARD J. HICKEY, JR.
MICHAEL S. WOLLY *
THOMAS A. WOODLEY
MULHOLLAND & HICKEY
1125 - 15th Street, N.W.
Washington, D.C. 20005
(202) 833-8855

*Counsel for Brotherhood Railway Carmen of the United States and Canada*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in finding that Delpro Company is a "carrier" as defined in the Railway Labor Act, 45 U.S.C. § 151 et seq.

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 5 |
| A. None of the Reasons Supporting Review Set Forth in Rule 19 is Present | 5 |
| B. The Decisions of the Courts Below—That Under the Facts of Record, the Mediation Board Properly Determined Delpro to be a Carrier Under the Act—Do Not Warrant Review By This Court | 5 |
| CONCLUSION | 8 |


## TABLE OF AUTHORITIES

*Cases*


| | |
|---|---|
| *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F.2d 644 (D.C. Cir. 1946) | 6, 7 |
| *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950), cert. denied, 342 U.S. 812 (1951) | 7 |
| *Pan American World Airways Inc. v. United Bro. of Carpenters*, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964) | 7 |
| *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) | 6 |


*Statutes*


| | |
|---|---|
| Railway Labor Act, | |
| 45 U.S.C. § 151, First | 2, 4, 5 |
| 45 U.S.C. § 152, Ninth | 2 |
| Railroad Retirement Act, | |
| 45 U.S.C. § 228a | 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-308

---

DELPRO COMPANY,

*Petitioner*

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

*Respondents*

and

DELPRO COMPANY,

*Petitioner*

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

*Respondents*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## BRIEF FOR BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

---

The Respondent, Brotherhood Railway Carmen of the United States and Canada, respectfully requests that this Court deny the petition for a writ of certiorari, seeking

review of the Third Circuit's judgment in this case. The Third Circuit, affirming the District Court and the National Mediation Board, held that Petitioner Delpro Company is a "carrier" within the meaning of the Railway Labor Act (45 U.S.C. § 151 et seq.) ("the Act") and thus subject to the jurisdiction of the Mediation Board. The opinions of the Courts below and the National Mediation Board are printed in an Appendix to the Petition ("App.").

## STATEMENT OF THE CASE

This case arose when the Respondent Brotherhood Railway Carmen of the United States and Canada (hereinafter "the Brotherhood") filed with the Mediation Board an Application for Investigation of a Representation Dispute, pursuant to Section 2, Ninth of the Act. 45 U.S.C. § 152, Ninth. By this Application, the Brotherhood requested the Board to investigate a dispute which had arisen among the employees of Petitioner Delpro Company (hereinafter "Delpro") as to who should be the employees' designated representative for the purposes of collective bargaining with Delpro and to certify the Brotherhood as that authorized representative.

During the Board's investigation of the Brotherhood's Application, Delpro contested the Board's jurisdiction by claiming that Delpro was not a "carrier" within the meaning of the Act. Section 1, First of the Act (45 U.S.C. § 151, First), defines the term "carrier" to include:

> any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling

> of property transported by railroad, and any receiver, trustee, or other individual or body judicial or otherwise, when in the possession of the business of any such "carrier". . . .

Delpro is a wholly-owned subsidiary of Trailer Train Company. Delpro's sole business is repair and maintenance of railroad freight cars owned by Trailer Train Company and two other Trailer Train subsidiaries. Trailer Train Company is owned by 29 railroads and two former railroads (all carriers within the meaning of the Act) and one freight forwarder. Trailer Train's board of directors consists of 44 senior officials of the owning carriers. Trailer Train's principal officers are also officers of Delpro.

The Mediation Board rejected Delpro's challenge to its jurisdiction. It concluded that Trailer Train Company and Delpro "[b]oth are owned and controlled by rail carriers, either directly or indirectly [and] exist solely to facilitate rail transportation by supplying or maintaining equipment to be used by rail carriers, which equipment historically has been owned and maintained by rail carriers." (App. A-21-A-27). Delpro moved for reconsideration, after which the Board reaffirmed its decision. (App. A-28-A-33).

Having resolved this jurisdictional challenge, the Board proceeded to conduct a secret ballot election among the employees of Delpro in the craft or class of "Carmen, Helpers and Apprentices" to determine their representation choice. The Brotherhood won this election by a vote of 103-1. Based on these results, the Board issued its Certification that the Brotherhood had been duly designated and authorized to represent Delpro's employees for the purposes of the Act. (App. A-34-A-35).

Delpro refused to bargain with the Brotherhood and filed suit in the U.S. District Court for the District of Delaware seeking to set aside the Board's Certification and to obtain a declaratory judgment that Delpro is not

a "carrier". Prior to service of Delpro's Complaint, the Brotherhood filed a separate action seeking, *inter alia*, to enjoin Delpro from refusing to bargain in good faith with the Brotherhood in violation of its obligation to do so under the Act.

The District Court found that the Board had applied the proper tests in determining Delpro's "carrier" status and that the Board's findings regarding material facts were fully supported by the administrative record. (App. A-37-A-48).

The Court of Appeals affirmed. (App. A-5-A-13). It found that Delpro's contention that the Act covers only companies owned or controlled by a single carrier, and not those owned or controlled by a group of carriers, "simply makes no sense, since the potential for disruption to commerce by rail could be as great or even greater in the [latter] case." (App. A-8). The Court of Appeals also rejected as contrary to the statute's plain meaning Delpro's contention that the ownership and control tests expressed in Section 1, First of the Act were not alternative tests for carrier status. (App. A-10-A-11).

Finally, the Court of Appeals "endorse[d] the district court's reasoning that inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as Delpro that is indirectly owned by a group of carriers." (App. A-12). The Court thus rejected Delpro's position that the use of the words "transportation" and "transported" in Section 1, First was intended "to exclude those performing essential services as repair work connected with the transportation of property by railroad." (App. A-11-A-12).

Delpro's petition for rehearing *en banc* was denied. (App. A-53-A-54).

## REASONS FOR DENYING THE WRIT

### A. None of the Reasons Supporting Review Set Forth in Rule 19 is Present.

The petition fails to demonstrate that any of the reasons in support of review in Rule 19 are present. The Court of Appeals relied upon the plain language of the statute and the undisputed facts of record to hold that Delpro is a "carrier" under the Act.

There is no conflict between the Court of Appeals' decision and the decision of another court of appeals; there is no question of federal law which should be settled by this Court, and there is no conflict with applicable decisions of this Court. See Rule 19 (b), Rules of Supreme Court.

### B. The Decisions of the Courts Below—That Under the Facts of Record, the Mediation Board Properly Determined Delpro to be a Carrier Under the Act—Do Not Warrant Review By This Court.

Petitioner would have this Court grant review to consider and reverse the decisions of both lower courts and the Mediation Board that the Railway Labor Act applies to Delpro. Petitioner does not challenge the factual findings below. Admitting those facts, and that it is "owned or controlled" by a carrier as provided in Section 1, First (Petition p. 9, fr. 18), Delpro asserts that the lower courts and the Mediation Board erred in holding that the railroad freight car repair and maintenance service Delpro provides the nation's rail carrier meets the statutory definition of "any service . . . in connection with the transportation . . . of property transported by railroad." 45 U.S.C. § 151, First. Plainly, the lower courts' finding that the repair of railroad cars is a function essential to the operation of any railroad and consequently constitutes the performance of a service in connection with the transportation of property by railroad is well-founded.

Delpro seeks review by this Court essentially because its employees do not handle the property being transported, only the cars in which the property is being transported. The Court of Appeals considered this distinction and found it to be without significance in light of the overall purpose and intent of the Act. (App. A-11-A-12).

Petitioner seizes upon the Court of Appeals' description of Delpro's "parsing of the statutory language [as] somewhat plausible" (App. A-11) to launch an argument that this Court must review the lower courts' decisions to clear up this purported ambiguity in the construction of the Act. There is in fact no such ambiguity. Acceptance of Delpro's argument would permit railroads "to take from under the Act virtually all of their workers whose employment is in the 'supporting' activities, through the simple expedient of sitting up wholly owned corporate affiliates to perform these services . . . [thereby] so severely limit[ing the Act] as to render [it] of little worth in achieving the purposes for which [it was] passed." *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946).

The Court of Appeals' analysis is wholly consistent with this Court's application of identical language in the Railroad Retirement Act, 45 U.S.C. § 228a. In *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), Duquesne argued that the work of loading and unloading freight cars was not a part of railroad transportation because "these services are rendered before railroad transportation has begun or after it has ended . . . ." 326 U.S. at 453-454. This Court rejected Duquesne's argument, like the Court of Appeals rejected Delpro's argument, in finding the crux of the case to be

> "whether a carrier's affiliate is performing a service that could be performed by the carrier and charged

> for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts. . . . We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate."

Id. at 454. See *Despatch Shops v. Railroad Retirement Board, supra*, 153 F.2d at 646 ("It is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock.").

Finally, there is no basis for Petitioner's assertion that the decision of the Court of Appeals forebodes far-reaching traumatic consequences for employees of all carrier subsidiaries, which consequences will "present recurring questions of interpretation" and are "likely to spawn further litigation." (Petition, pp. 8, 9). The simple fact is that the Mediation Board determines "carrier" status only in the context of applications requesting its services, on a case-by-case basis. Little litigation has occurred on this question in the past and little is likely to ensue as a result of the lower courts' disposition of the matter.

Moreover, the Court of Appeals' analysis of the statute is consistent with that of every other court which has considered the issue. See *Northwest Airlines v. Jackson*, 185 F.2d 74, 77 (8th Cir. 1950), cert. denied, 342 U.S. 812 (1951) ("The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to transportation activities."); *Pan American World Airways Inc. v. United Bro. of Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964) ("The statute thus made certain that railroads could not escape the application of the statute to activities closely related to railroad transportation, by

having those activities carried on by subsidiary or controlled enterprises.").

Petitioner's efforts to have this Court review the uniform holdings of the Mediation Board and the courts below so to overrule universally accepted applications of the clear language and intent of the statute should be rejected.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. HICKEY, JR.
MICHAEL S. WOLLY *
THOMAS A. WOODLEY
MULHOLLAND & HICKEY
1125 - 15th Street, N.W.
Washington, D.C. 20005
(202) 833-8855
*Counsel for Brotherhood Railway Carmen of the United States and Canada*

* Counsel of Record